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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

EDWARD MACIAS,

Defendant and Appellant.

B303559

(Los Angeles
Super. Ct. No. VA097246)

APPEAL from an order of the Superior Court of
Los Angeles County, William C. Ryan, Judge. Affirmed.

Richard L. Fitzer, under appointment by the Court of
Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Lance E. Winters, Chief
Assistant Attorney General, Susan Sullivan Pithey, Senior
Assistant Attorney General, Noah P. Hill, Supervising Deputy
Attorney General, and Chung L. Mar, Deputy Attorney General,
for Plaintiff and Respondent.

Edward Macias petitioned for recall of sentence under Proposition 36, the Three Strikes Reform Act of 2012 (Pen. Code, § 1170.126).¹ The superior court denied the petition, finding Macias was ineligible for relief because his current sentence had been imposed for an offense committed with the intent to cause great bodily injury to another person. On appeal Macias contends the circumstantial evidence of his specific intent, which was not at issue at trial, is insufficient to support a finding beyond a reasonable doubt that he is ineligible for resentencing. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. The Commitment Offense²

As Cynthia Moreno arrived at a laundromat in Whittier on September 16, 2006, she encountered Macias standing inside near the entrance. Moreno knew Macias from the neighborhood; the two occasionally said hello to each other. Macias asked Moreno if she had any spare change. She replied she did not and walked away. Approximately 15 minutes later Macias approached Moreno and, without speaking to her, grabbed her by the neck and threw her to the ground. He then stepped on Moreno and kicked her five to seven times on the back and neck. Macias stopped kicking Moreno only when a bystander approached and told him to stop. Macias then calmly walked out of the laundromat.

¹ Statutory references are to this code.

² We borrow our description of the crime and the events at Macias's trial from our decision reversing the superior court's initial decision denying Macias's petition for recall and resentencing. (*People v. Macias* (Dec. 20, 2018, B287199) [nonpub. opn.])

After the attack Moreno was crying and holding her arm. She was helped into a chair by two bystanders, and paramedics were called. Moreno was taken to the hospital where she was examined and given pain medication.³ During the trial four months later she testified she was still experiencing pain. Moreno also testified Macias did not speak to her immediately before or during the attack and she did not know why he attacked her. She said Macias was taller and substantially heavier than she was.

Shawna Divens was also at the laundromat on September 16, 2006. She testified Macias approached her and “made ridiculous comments” that she could not understand. Macias then left the laundromat. After 15 minutes Macias returned and “was walking straight forward as if he wasn’t going to do anything. And then suddenly he turned around, grabbed Mrs. Moreno by her neck, threw her to the ground, stepped on her and kicked her several times.”

Macias was located by police officers in a nearby parking lot approximately an hour after the incident. He initially told the police he had not been at the laundromat that day, but later said he had been there and had seen the assault. He said the assailant looked like him.

Macias testified in his own defense. He admitted having been in an altercation with Moreno at the laundromat, but claimed he had been defending himself. He said Moreno had been drunk and had asked him for money. When he refused to

³ The paramedics put a “head brace” on Moreno when taking her to the hospital. She did not use a head or neck brace thereafter.

give her any, she got angry and punched him. He pushed her away, and she lost her balance and fell.

A jury found Macias guilty of assault by means likely to produce great bodily injury (former § 245, subd. (a)(1), now § 245, subd. (a)(4)). The trial court found true the special allegations Macias had suffered two prior strike convictions—one for robbery (§ 211) and one for making a criminal threat (§ 422). In denying Macias’s motion to dismiss one of the prior strike convictions, the court stated, “[Macias] did perjure himself on the stand. His testimony was fundamentally implausible and the jury didn’t buy it. . . . The officer who arrested him [after the assault] said he was totally coherent. And yet the defendant took the stand and said everything the officer said was a lie. . . . He contradicted the officer’s attributions to him as to the statements that he made. . . . This was a totally uncalled for, unjustified assault [in] this case. The independent witnesses were particularly credible.” The trial court sentenced Macias under the three strikes law (§§ 1170.12, subds. (a)-(d), 667, subds. (b)-(i)) to an indeterminate state prison term of 25 years to life. We affirmed the conviction and sentence on appeal. (*People v. Macias* (Apr. 16, 2008, B197439) [nonpub. opn.])

2. Macias’s Petition and the Initial Superior Court Ruling

On December 26, 2012 Macias petitioned for recall of sentence and resentencing, contending he was eligible for relief under Proposition 36 because he would not have been subject to an indeterminate life sentence as a third strike offender had the proposition been in effect at the time of sentencing (§ 1170.126, subd. (b)). On February 21, 2013 the trial court issued an order to show cause why the petition should not be granted.

The People opposed the petition, asserting Macias was ineligible for resentencing under section 1170.126, subdivision (e)(2), because “[d]uring the commission of the current offense, the defendant . . . intended to cause great bodily injury to another person.” (§§ 667, subd. (e)(2)(C)(iii), 1170.12, subd. (c)(2)(C)(iii).) In response Macias argued the prosecution had not sought to prove an allegation he had inflicted, or intended to inflict, great bodily injury during his attack on Moreno. He further argued he had not intended great bodily injury, and he stopped the attack and left the laundromat before any likelihood of great bodily injury arose.

Following a hearing the superior court found by a preponderance of the evidence that Macias was ineligible for resentencing because he had intended to cause great bodily injury to Moreno during the assault.⁴ The court discharged the order to show cause and denied Macias’s petition.

3. *Macias’s Appeal of the Denial of His Petition*

One month after the trial court’s ruling the Supreme Court decided *People v. Frierson* (2017) 4 Cal.5th 225, 240 (*Frierson*), which held the People must establish ineligibility for resentencing under Proposition 36 beyond a reasonable doubt. (Accord, *People v. Perez* (2018) 4 Cal.5th 1055, 1059 [“Proposition 36 permits a trial court to find a defendant

⁴ The resentencing provision of Proposition 36 does not expressly identify the standard of proof to be applied to determine an inmate’s eligibility for resentencing. At the time of the initial hearing on Macias’s petition for recall of sentence, most courts of appeal that had addressed the issue had held the correct standard of proof was preponderance of the evidence.

. . . ineligible for resentencing only if the prosecutor proves [the] basis for ineligibility beyond a reasonable doubt”].)

On Macias’s appeal from the denial of his petition, the Attorney General conceded the superior court had erred when it employed a preponderance standard of proof in determining Macias was ineligible for relief under section 1170.126, subdivision (e)(2), but argued the error was harmless under the *Watson* standard⁵ because it was not reasonably probable the court using the heightened, reasonable doubt standard of proof would not have found that Macias intended to cause great bodily injury during the assault. We disagreed and remanded the matter to the superior court with directions to conduct a new evidentiary hearing utilizing the proper standard of proof as established in *Frierson, supra*, 4 Cal.5th 225. (*People v. Macias* (Dec. 20, 2018, B287199) [nonpub. opn.].) After reviewing the circumstantial evidence relating to Macias’s intent, we explained, “Although the superior court could certainly infer from this evidence that Macias intended to cause Moreno great bodily injury, there is a reasonable probability a finder of fact authorized to weigh credibility and determine state of mind, which we are not, would conclude the requisite intent had not been proved beyond a reasonable doubt. That determination is properly made by the superior court in the first instance.” (*Id.* at p. 9.)

⁵ The state law harmless error standard articulated in *People v. Watson* (1956) 46 Cal.2d 818, 836, applied because use of the beyond a reasonable doubt standard was based on state law, not federal constitutional law (*Frierson, supra*, 4 Cal.5th at pp. 235-239).

4. *The Decision on Remand*

Following issuance of the remittitur, the superior court reinstated Macias's petition and reappointed his counsel. After a further eligibility hearing on November 4, 2019, at which the matter was taken under submission, the court on November 12, 2019 issued a written decision finding beyond a reasonable doubt Macias had intended to cause great bodily injury during his aggravated assault on Moreno. The court denied Macias's petition with prejudice.

Explaining its ruling the court wrote, "Petitioner was found guilty of assault likely to produce great bodily injury. During the incident, Petitioner hooked his arm around the victim's neck and threw her to the ground. He then stepped on the victim and kicked her in the back and neck five to seven times. Petitioner only stopped his assault when a witness intervened. The victim required help up off the floor and into a chair, at which point the victim was crying and holding her arm. Petitioner required a paramedic transport to the hospital where she was treated and released. She was given a neck brace and prescribed pain medication. At the time of trial, the victim was still suffering from pain in her neck and back. [¶] While the court's prior finding of ineligibility was made under the preponderance-of-the-evidence standard, the foregoing also supports a finding beyond a reasonable doubt that Petitioner '[d]uring the commission of the current offense, . . . intended to cause great bodily injury to another person.'"

DISCUSSION

1. *Governing Law and Standard of Review*

Proposition 36 amended the three strikes sentencing scheme by providing, in general, a recidivist is not subject to an

indeterminate life term for a third felony that is neither serious nor violent unless the offense satisfies other criteria identified in the statutes. (§§ 667, subd. (e)(2)(C), 1170.12, subd. (c)(2)(C); see *Frierson*, *supra*, 4 Cal.5th at p. 229.) It also permitted some inmates serving a three strikes sentence to petition for the recall and modification of their current sentence on the ground they would not have been subject to an indeterminate life sentence had Proposition 36 been in effect at the time of their sentencing. (§ 1170.126, subd. (b).)

Eligibility for resentencing depends on several factors. An inmate will be denied resentencing if (1) the current offense was serious or violent; (2) the prosecution establishes one of the four disqualifying exceptions to resentencing under Proposition 36; or (3) the superior court determines, in its discretion, that resentencing the inmate would pose an unreasonable risk of danger to public safety. (§ 1170.126, subds. (e) & (f).) One of the disqualifying exceptions is if, “[d]uring the commission of the current offense, the defendant used a firearm, was armed with a firearm or deadly weapon, or intended to cause great bodily injury to another person.” (§§ 667, subd. (e)(2)(C)(iii), 1170.126, subd. (e)(2), 1170.12, subd. (c)(2)(C)(iii); see *People v. Estrada* (2017) 3 Cal.5th 661, 667.)

The petitioner has the initial burden of establishing a *prima facie* case of eligibility for relief under Proposition 36. (*Frierson*, *supra*, 4 Cal.5th at p. 234; *People v. Thomas* (2019) 39 Cal.App.5th 930, 935 (*Thomas*).) Once that requirement has been satisfied, the burden shifts to the People to prove beyond a reasonable doubt that one of the disqualifying factors applies.

(*People v. Perez, supra*, 4 Cal.5th at pp. 1059, 1062; *Frierson*, at p. 236; *Thomas*, at p. 935.)

In evaluating the question of eligibility, the superior court is authorized to make findings based on the entire record of conviction: “Proposition 36 permits a trial court to examine facts beyond the judgment of conviction in determining whether a resentencing ineligibility criterion applies.” (*People v. Perez, supra*, 4 Cal.5th at p. 1063; accord, *People v. Estrada, supra*, 3 Cal.5th at p. 672; see *Thomas, supra*, 39 Cal.App.5th at p. 935; see also *People v. Brimmer* (2014) 230 Cal.App.4th 782, 800-801 [“a trial court may rely on the record of conviction, including this court’s prior opinion in defendant’s appeal from his original judgment and trial transcripts, as evidence to determine eligibility” under Proposition 36].)

The superior court’s eligibility determination “is a factual determination reviewed on appeal for substantial evidence. [Citation.] That is, the reviewing court must determine if there was sufficient evidence for the trial court to conclude that the prosecutor . . . prove[d] that the petitioner is ineligible for resentencing beyond a reasonable doubt. Under this standard, the burden remains on the prosecutor to demonstrate the petitioner’s ineligibility [citation]; the burden never shifts to the petitioner, either in the trial court or on appeal, to provide any evidence once he or she has made an initial showing of eligibility. Further, the reviewing court does not reweigh the evidence; appellate review is limited to considering whether the trial court’s finding of [ineligibility] is supportable in light of the evidence.” (*People v. Perez, supra*, 4 Cal.5th at p. 1066; accord, *Thomas, supra*, 39 Cal.App.5th at pp. 935-936 [“[i]n reviewing the trial court’s eligibility determination, we view the evidence in

the light most favorable to the trial court's findings without reassessing the credibility of witnesses or resolving evidentiary conflicts"].)

2. *Intent To Inflict Great Bodily Injury*

Section 12022.7, subdivision (f), defines great bodily injury as a "significant or substantial physical injury." Although minor or moderate harm is insufficient to constitute great bodily injury (see CALCRIM No. 3163), "the injury need not be so grave as to cause the victim "permanent," "prolonged," or "protracted" bodily damage." (*People v. Cross* (2008) 45 Cal.4th 58, 64.)

"[T]he intent to inflict [great bodily] injury may be shown by, and inferred from, the circumstances surrounding the doing of the act itself." (*People v. Phillips* (1989) 208 Cal.App.3d 1120, 1124; accord, *Thomas, supra*, 39 Cal.App.5th at p. 936; see *In re Sergio R.* (1991) 228 Cal.App.3d 588, 601 ["The intent to inflict great bodily injury need not be proven by direct evidence. Such intent may be inferred or presumed. "It is black-letter law that a party is presumed to intend to do that which he voluntarily or willfully does in fact do and also presumed to intend the natural, probable and usual consequences of his own acts""]).) An individual's "intent 'is a question of fact to be determined from all the circumstances of the case.'" (*Hudson v. Superior Court* (2017) 7 Cal.App.5th 1165, 1171.) "Actual infliction of great bodily injury is not a prerequisite to finding intent to cause such injury." (*Thomas*, at p. 937, italics omitted.)

3. *Substantial Evidence Supports the Superior Court's Finding of Ineligibility*

As we described in our December 2018 opinion and the superior court summarized in its November 12, 2019 ruling, Macias violently threw Moreno to the ground; kicked her while

she was down not only in the back but also her neck, a vulnerable part of the body; and stopped the attack only when a bystander intervened. That evidence amply supported the superior court's finding beyond a reasonable doubt that Macias intended to inflict great bodily injury on Moreno. Indeed, we said as much in our opinion, explaining the superior court could reasonably infer that Macias intended to cause great bodily injury under the governing standard of proof but leaving it to that court in the first instance to weigh credibility and determine Macias's state of mind.

Macias raises two objections to this conclusion. First, because the question of specific intent was not at issue at trial, Macias contends the circumstantial evidence cited to support the finding he intended to inflict great bodily injury was not tested by cross-examination and, therefore, is not sufficiently reliable to support the court's finding. Second, because the superior court judge hearing his petition for recall had not presided at the 2007 trial, Macias argues we should not defer to his factual findings regarding Macias's mental state based on evidence in the record of conviction. Neither argument has merit.

Macias's contention that only those matters directly at issue at trial, and thus subject to cross-examination, may be considered in determining a petitioner's eligibility for relief under Proposition 36 was explicitly rejected by the Supreme Court in *People v. Estrada, supra*, 3 Cal.5th at page 670, which held the inquiry into eligibility "can extend beyond elements of the specific offense of conviction or facts that those elements necessarily imply." As the Court explained, "Before passage of the Act, prosecutors had little reason to prove any conduct on a defendant's part that now constitutes disqualifying conduct under section 1170.12, subdivision (c)(2)(C)(iii). [Citation.] As

the facts of this case aptly demonstrate, a judgment that predates Proposition 36 may at times fail to imply anything about disqualifying conduct, even if the evidence available to the prosecution could have supported such a finding. For this reason, we think it unlikely that it was part of the Act's design to prevent courts reviewing a recall petition from considering conduct beyond that implied by the judgment. Given the importance of the Act's distinction between violent and nonviolent criminal conduct, it seems implausible that the Act is best understood to condition ineligibility on an indicator of violence that the prosecution had no incentive to incorporate into the judgment. Accordingly, section 1170.12, subdivision (c)(2)(C)(iii) would be substantially underinclusive were we to interpret it to apply only to cases in which the judgment implies disqualifying conduct.” (*Id.* at pp. 671-672.)

Macias's argument we should not defer to the superior court's factual findings because they were made on the basis of a cold record rather than live testimony is also inconsistent with the Supreme Court's Proposition 36 jurisprudence. As discussed, in *People v. Perez, supra*, 4 Cal.5th at page 1066, the Supreme Court held appellate review of the superior court's eligibility determinations “is limited to considering whether the trial court's finding of [ineligibility] is supportable in light of the evidence.” (See also *id.* at p. 1059 [appellate court “must defer to the trial court's determination if it is supported by substantial evidence”]; *Thomas, supra*, 39 Cal.App.5th at p. 1036 [“the same deferential standard of review applies when a court's finding is based on circumstantial evidence and requires that we ‘accept logical inferences that the [trial court] might have drawn from the circumstantial evidence’”].)

DISPOSITION

The order denying Macias's petition is affirmed.

PERLUSS, P. J.

We concur:

SEGAL, J.

FEUER, J.